IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT S.	:	**CIVIL ACTION**
	:	
V.	:	
	:	
CITY OF PHILADELPHIA, et al.	:	**NO. 97-6710**

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J. **March 30, 2000**

Plaintiff Robert S. ("Robert") brought suit against the City of Philadelphia ("City"), the Philadelphia Department of Human Services ("DHS"), DHS Commissioner Joan Reeves, and DHS officials Ingo Schamber, Matt Greenberg, and Robert Joiner (the "individual City defendants") under 42 U.S.C. § 1983; plaintiff alleged violations of his substantive due process rights and various pendent state law tort claims. Plaintiff also brought suit under section 1983 against the Stetson School, Inc. ("Stetson"), Richard Robinson, Dave LaPrad, Ray Williams, Mike Williams, and Robert Martin (collectively, the "Stetson defendants") for physical and psychological abuse in violation of his constitutional rights and asserted various state law tort claims against the individual Stetson defendants. The section 1983 claims against the Stetson defendants have been dismissed for lack of state action; some individual state tort claims remain for trial. Before the court is the motion of the City, DHS and

the individual City defendants for summary judgment[1] on plaintiff's section 1983 claims. For the reasons set forth below, this motion will be granted.

BACKGROUND

On December 16, 1993, Robert, then age 13, was adjudicated dependent and placed in the custody of DHS. Robert had a history of being both a victim and a perpetrator of sexual abuse. Defendant Robert Joiner was Robert's DHS social worker; Defendants Ingo Schamber and Matt Greenberg were DHS administrative and supervisory employees. Defendant Joan Reeves was DHS Commissioner.

In May, 1995, DHS placed Robert at the Stetson School in Barre, Massachusetts. Stetson is a non-profit charitable organization that specializes in the treatment and education of sex offenders.

Robert alleges that between May, 1996 and February, 1997, former Stetson staff members Dave LaPrad, Mike Williams, Ray Williams and Robert Martin subjected him to physical and psychological abuse, including kicking, punching, wrestling and verbal harassment. The conduct violated Stetson's express "anti-horseplay" policy. Robert's mother visited him at Stetson at least once a month; he also spoke with her about twice a week on

[1]The motion does not address the state law claims against the individual City defendants; as to them the motion must be for partial summary judgment.

the telephone, but he never complained to her about horseplay or any other form of abuse. In February, 1997, Robert reported his objections to this conduct to a Stetson therapist. An internal investigation resulted in the dismissal of defendants Laprade, Martin and Ray Williams and the discipline of other Stetson employees. A Massachusetts agency also investigated and concluded that Stetson responded appropriately. DHS removed Robert from Stetson in May, 1997 with the knowledge and consent of his mother.

According to plaintiff, as a child with a history of "acting out sexually," this type of "horseplay" was harmful to Robert and severely disrupted his treatment; the abuse was particularly egregious because the school's purpose is to help children like Robert overcome their sexual behavior problems.

Robert Joiner, Robert's DHS caseworker, admitted he never visited Robert at Stetson, despite DHS regulations requiring social workers to visit children in placements at least once every six months. There is also evidence that Joiner did not keep adequate records in Robert's case. DHS required an "Individualized Service Plan" ("ISP") for Robert that had to be reviewed formally every six months; Joiner attended only one of Robert's ISP reviews. Ingo Schamber, Administrator of Social Services of the Children and Youth Division of DHS during Robert's stay at Stetson, acknowledged Joiner's failure to visit

Robert, and admitted he did not discover the non-compliance until Robert was removed from Stetson.

Robert alleges that the individual DHS defendants are liable under section 1983 for failing to intervene at Stetson on his behalf. He also alleges that the City of Philadelphia is liable for a implementing a policy of this type of violative conduct.

DISCUSSION

I. Standard of Review

Summary judgment may be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A defendant moving for summary judgment bears the initial burden of demonstrating there are no facts supporting the plaintiff's legal claim; then the plaintiff must introduce specific, affirmative evidence there is a genuine issue for trial. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-324 (1986). "When a motion for summary judgment is made and supported as provided in [Rule 56], an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in [Rule 56], must set forth specific facts

showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

The court must draw all justifiable inferences in the non-movant's favor. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). A genuine issue of material fact exists only when "the evidence is such that a reasonable jury could return a verdict for the non-moving party." Id. at 248. The non-movant must present sufficient evidence to establish each element of its case for which it will bear the burden at trial. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986).

The court will first consider the motion of the individual City defendants, and then the motion of the City and DHS.

II. Individual City Defendants

The federal claims against the individual City defendants are based on their failure to intervene on Robert's behalf to prevent the allegedly improper conduct of the Stetson defendants. As a general rule, the due process clauses do not confer an affirmative right to governmental aid; the state cannot be constitutionally liable for its failure to act. See DeShaney v. Winnebago County Dep't. of Soc. Servs., 489 U.S. 189, 196 (1989). The due process clause "does not transform every tort committed by a state actor into a constitutional violation." Id. at 202.

The courts have recognized two exceptions to this general rule: when there is a "state-created danger," and when there is a "special relationship.". Plaintiff argues that the "special relationship" exception applies here.

The "special relationship" exception applies "when a state takes a person into its custody and holds him there against his will," such as in a prison or a mental hospital. Deshaney v. Winnebago County Dep't. of Soc. Servs., 489 U.S. 189, 199 - 200. In that situation, "the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." Id. If the state imposes a limitation on an individual's freedom to act on his own behalf-- once it enters into a "special relationship" with the individual-- it incurs a constitutional responsibility to act affirmatively to protect that individual. See id. at 200. The Deshaney Court recognized, but did not apply, this exception because the abused child was in the custody of his father, not the state, at the time of his severe injuries. Even though the county once had temporary custody of the child, the Court held the county not liable for its failure to intervene because the state had no obligation to protect a citizen from a private actor. See id. at 197.

There was a "special relationship" between Robert and DHS. Unlike the Deshaney plaintiff, Robert was in the custody of DHS

during his stay at Stetson. DHS was required, by its own rules, to keep in contact with Robert and Stetson, and to make periodic visits. DHS had the right to make decisions about who could visit Robert at Stetson, how often and whether or not to remove Robert from Stetson.

The court must determine whether its failure to act could violate Robert's substantive due process rights. In the past, there has been some degree of confusion among the courts as to the appropriate standard to apply. It is now clear that the action of the state actor must "shock the conscience." Only the "most egregious official conduct" will be so "ill-conceived or malicious" that it rises to this level. County of Sacremento v. Lewis, 523 U.S. 833, 846-847 (1998).

Whether an act meets this standard depends on the facts of the particular situation. See id. at 850. Lewis involved a challenge to police conduct during a high-speed chase; the Court held that police officers pursuing suspects must necessarily make quick decisions and weigh competing obligations, so their conduct cannot shock the conscience in the absence of an actual intent to harm. See id. at 854.

The Third Circuit Court of Appeals decided Miller v. City of Philadelphia, 174 F.3d 368 (3d Cir. 1999), after Lewis. One Miller plaintiff was a mother who had lost custody of her children following an emergency child custody hearing. She sued,

among other defendants, DHS and a DHS social worker for improper conduct during that hearing. See id. at 370-71. The Miller court applied the Lewis "shock the conscience" standard to the challenged conduct: although a social worker does not operate in the "hyperpressurized environment of a prison riot or a high-speed chase . . . he or she rarely will have the luxury of proceeding in a deliberate fashion . . ." Miller, 174 F.3d at 375-76. The court concluded that the behavior at issue did not "shock the conscience."

We agree with the well-reasoned opinion of Judge Brody in Cannon v. City of Philadelphia, No. 98-4790, 2000 WL 218121 (E.D. Pa. Feb. 24, 2000), that Lewis and Miller now require applying the "shock the conscience" standard to all substantive due process claims under section 1983. See Cannon, 20000 WL 218121 at *8. It is a flexible standard depending on the facts of each case.

A. Robert Joiner, Ingo Schamber and Matt Greenberg

Plaintiff alleges that these defendants were directly involved in Robert's care, and are personally liable under section 1983 for the failure of Robert's social worker, Robert Joiner, to visit Robert at Stetson, and for other flaws in Joiner's handling of Robert's case. According to plaintiff, had Joiner visited Robert at Stetson, he would have learned about the abuse inflicted on Robert by the Stetson staff and could have

done something to prevent it. Ingo Schamber and Matt Greenberg are allegedly responsible for Joiner's failure to visit Robert because, as Joiner's supervisor and administrative supervisor, they were responsible for Robert's case; plaintiff also alleges they gave Joiner permission to refrain from carrying out his responsibilities.

There is evidence of wrongdoing by Joiner and his supervisory staff: Joiner's failure to visit Robert at Stetson in violation of DHS regulations, Joiner's failure to keep adequate records in Robert's case, and Joiner's absence from several of Robert's ISP reviews. There is also evidence that Joiner's supervisors, Schamber and Greenberg, knew of the wrongdoing and condoned it.

Plaintiff's expert, Dr. Theodore Stein, offers his opinion that DHS did not manage Robert's case according to proper standards, but not that the harm suffered by Robert at Stetson would have been avoided had DHS complied with these standards.

Plaintiff does not allege Joiner knew of the abuse and failed to take action, but he does allege Joiner would have known about the abuse had he complied with his obligation to visit Stetson. There is no evidence that Robert's injuries would have been prevented had Joiner complied with DHS regulations and visited Stetson. Robert's mother visited him at Stetson at least once a month, but Robert did not report his claims of abuse to

her or anyone else until February, 1997, when he reported it to a Stetson therapist. Stetson then conducted an internal investigation, determined that improper horseplay had occurred, and disciplined the staff members involved.

Joiner, Greenberg and Schamber may well have been negligent in failing to comply with their DHS-imposed duty to monitor Robert. Their acts (or their failure to act) over a period of almost two years suggest time to proceed in a deliberate fashion; the level of egregiousness necessary to meet the "shocks the conscience" standard is consequently lower than it would be in the case of a high-speed police chase or a child custody hearing. But the link between their failures to act and the abuse suffered by Robert is a tenuous one. There is no reason to believe Robert's case workers would have discovered the abuse had they complied with DHS regulations. Robert never reported it to his mother or to any Stetson therapist until February 1997, at which point the horseplay stopped; Robert left Stetson soon after. The evidence plaintiff has offered does not suggest Robert would have reported any abuse to Joiner had he visited. In the absence of evidence that the alleged misconduct caused plaintiff's injury, a reasonable jury could not find that the misconduct "shocks the conscience."

B. Commissioner Joan Reeves

Plaintiff also alleges that Commissioner Reeves is responsible for "the omissions of care" by Robert's caseworkers. There is no evidence that Commissioner Reeves was personally involved in Robert's case, so the only basis for her liability is supervisory. The standard for personal supervisory liability is the same as the standard for municipal liability defined in Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978). See Carter v. City of Philadelphia, 181 F.3d 339, 356-57 (3d Cir. 1999). Reeves, like DHS, cannot be liable for constitutional violations of DHS employees because the theory of respondeat superior does not apply to section 1983 actions. Monell, 436 U.S. at 691-92. The failure to supervise must amount to her knowing, "deliberate indifference" to the rights of persons with whom the supervised employees will come into contact. See Carter, 181 F.3d at 357.

> In order for a failure to train or supervise to amount to deliberate indifference, it must be shown that: 1) municipal policymakers know that employees will confront a particular situation; 2) the situation involves a difficult choice or a history of employees mishandling; and 3) the wrong choice by an employee will frequently cause deprivation of constitutional rights.

Id. at 357.

The conduct of Joiner, Schamber and Greenberg did not deprive Robert of constitutional rights under section 1983, so part three of this test has not been satisfied. Commissioner Reeves is not liable under section 1983 either for her individual

participation in Robert's case (of which there is no evidence) or for her supervisory role because there is no evidence she knew of Robert's mistreatment or that she was deliberately indifferent to it. There is only evidence that as Commissioner, she should have known of the social worker's failure to visit Robert at Stetson and his failure to keep adequate records, but there was no evidence that caused Robert's difficulties. On this record, it is clear that if there was harm to Robert, it was caused by the horseplay of Stetson employees, not the inaction of DHS employees who did not know about it.

III. City and DHS

Plaintiff also alleges that the City of Philadelphia and the Philadelphia Department of Human Services are liable under section 1983 for "failing to isolate instances of abuse such as that which occurred in this case," (Compl. at ¶ 35), and failing to "adequately discipline, train, supervise and/or otherwise direct" their employees concerning the proper conduct. (Compl. ¶ 40.)

As with Commissioner Reeves, neither the City nor DHS can be liable under section 1983 through a respondeat superior theory. Monell, 436 U.S. at 691-92. In order to impose section 1983 liability on a municipality, a plaintiff must show that "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said

to represent official policy," caused the constitutional injury. Id. at 694. “Policy is made when a ‘decisionmaker possess[ing] final authority to establish municipal policy with respect to the action’ issues an official proclamation, policy, or edict. A course of conduct is considered to be a ‘custom’ when, though not authorized by law, ‘such practices of state officials [are] so permanent and well settled’ as to virtually constitute law.” Beck v. City of Pittsburgh, 89 F.3d 966, 971 (3d Cir. 1996), cert. denied, 117 S. Ct. 1086 (1997),(quoting Andrew v. City of Phila., 895 F.2d 1469, 1480 (3d Cir. 1990)).

Plaintiff acknowledges that if Robert's experience with DHS and Stetson was "singular and unique, no liability would exist as to DHS." (Pl.'s Resp. to City Defs.' Mot. for Summ. J. at 23.) Plaintiff therefore bases his claims against DHS and the City of Philadelphia on an alleged "pattern or practice" by DHS of inadequate supervision of the children it sends to Stetson.

To show evidence of such a pattern or practice, plaintiff points to two other examples of inadequate DHS supervision of children sent to Stetson. Both children claim they were mistreated by Stetson staff, and that their DHS social worker never visited them. One child testified he notified his DHS social worker of verbal abuse by Stetson staff.

These three instances of inadequate supervision by DHS employees do not constitute a custom so "permanent and well

settled" that is rises to the level of departmental law or policy. Andrew, 895 F.2d at 1480 (3d Cir. 1990). Plaintiff himself notes (in arguing that the conduct of the individual DHS employees was improper) that DHS policy required its social workers to visit children at least once every six months and participate in the development of the "Individual Service Program." (Pl.'s Resp. to City Def.'s Mot. for Summ. J. at Ex. E.) Three examples of violations are insufficient evidence that violating the policy, rather than the policy itself, is the true policy or practice.

Plaintiff has offered insufficient evidence to establish a Monell claim based on DHS failure to train or supervise its employees adequately. Liability under section 1983 for failure to train or supervise employees "requires a showing that the failure amounts to 'deliberate indifference' to the rights of persons with whom those employees will come into contact." Carter v. City of Philadelphia, 181 F.3d 339, 357 (3d Cir. 1999) (citation omitted). The inadequate supervision must be "very likely to result in violation of constitutional rights." Id.

Plaintiff has offered evidence that one of Robert's supervisors, Ingo Schamber, neglected to supervise his interaction with Robert. But the uncertainty of the link between the inadequate supervision and the alleged abuse prevents us from finding that the supervision problems were "very likely to result

in violation of constitutional rights." Id. Even failure to train or supervise must be extensive enough to amount to a policy; evidence of such a failure on the part of Schamber in this instance does not establish one, nor can Schamber be said to be in a position that would give his inadequate supervision of Joiner the force of policy. Plaintiff has offered evidence of a specific failure to abide by policy with regard to some Stetson students but not a general agency-wide failure to train either social workers or supervisors, or a deficiency in the agency's training program. Summary judgment will be granted to the City and DHS on the federal constitutional claims. This decision does not affect the pending state law claims as this motion does not address immunity under the Political Subdivision Tort Claims Act.

CONCLUSION

"[T]he due process guarantee does not entail a body of constitutional law imposing liability whenever someone cloaked with state authority causes harm . . . the Fourteenth Amendment is not a 'font of tort law to be superimposed upon whatever systems may already be administered by the States' . . . the Constitution does not guarantee due care on the part of state officials; liability for negligently inflicted harm is categorically beneath the threshold of constitutional due

process. " County of Sacremento v. Lewis, 523 U.S. 833, 848 (1998) (citations omitted). A reasonable jury could not find, based on the evidence offered by plaintiff, that the conduct of the City, DHS or the individual City defendants rose to the level of a constitutional tort.

An appropriate Order follows.

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ORDER

AND NOW, this 30th day of March, 2000, upon consideration of the motion for summary judgment the City of Philadelphia, DHS, Joan Reeves, Ingo Shamber, Matt Greenberg and Robert Joiner, and plaintiff's response thereto, it **ORDERED** that:

1. The individual City defendants' motion for summary judgment is **GRANTED** as a motion for partial summary judgment.

2. The motion for summary judgment of the City of Philadelphia and DHS is **GRANTED**.

3. Plaintiff's motion opposing summary judgment is **DENIED**.

4. Plaintiff's surviving state law tort claims remain for trial.

S.J.